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April 3, 1998

Ms. Magalie R. Salas
Secretary
Federal Communications Commission
Washington, D.C. 20554

Re: **Gerard A. Turro, et al.**
MM Docket No. 97-122

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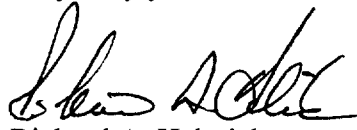
APR 3 - 1998

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Dear Ms. Salas

Submitted herewith are an original and six copies of the Reply of Universal Broadcasting of New York, Inc. to Proposed Findings of Fact and Conclusions of Law in the above-captioned proceeding.

Very truly yours


Richard A. Helmick

Enclosures

cc w/encl. (via hand delivery):

Honorable Arthur I. Steinberg
Alan E. Aronowitz, Esq.
Charles R. Naftalin, Esq.
James P. Riley, Esq.

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BEFORE THE

Federal Communications Commission

In re)
)
GERARD A. TURRO)
)
For Renewal of License)
for FM Translator Stations)
W276AQ(FM), Fort Lee, NJ, and)
W232AL(FM), Pomona, NY)
)
MONTICELLO MOUNTAINTOP)
BROADCASTING, INC.)
)
Order to Show Cause Why the Construction)
Permit for FM Radio Station WJUX(FM),)
Monticello, NY, Should Not Be Revoked)

MM Docket No. 97-122

File Nos. BRFT-970129YC
BRFT-970129YD

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APR 3 - 1998

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

To: Honorable Arthur I. Steinberg
Administrative Law Judge

REPLY OF UNIVERSAL BROADCASTING OF NEW YORK, INC. TO PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

Universal Broadcasting of New York, Inc. ("Universal"), by its attorneys, hereby submits its reply to the proposed findings of fact and conclusions of law ("F & C") of Monticello Mountaintop Broadcasting, Inc. ("MMBI") and Gerard A. Turro ("Turro") in the above-captioned proceeding.

MMBI

1. **Main Studio Staffing Issue.** MMBI asserts that "Montana makes sure that PSAs are broadcast on WJUX by listening to them." F&C at 11. MMBI later qualified that broad assertion by noting that "Montana monitors WJUX broadcasts when going to and from work but not during the day when she is at work at the WJUX main studio building." F&C at 19. Accordingly, Montana's

monitoring of what PSA's are in fact broadcast by WJUX is not expansive but, rather, limited in its scope. See Universal's F&C at 24.

2. MMBI asserts that Blabey's duties as general manager of WJUX are "typical for a person serving as general manager of a radio station for which the vast majority of programming and commercial material are furnished to the licensee under contract, whether an LMA or affiliation agreement." F&C at 47. Examples of such duties cited by MMBI were representing WJUX in the Sullivan County community, suggesting potential WJUX employees to Weis, answering WJUX phone calls, going through the WJUX mail, handling personnel scheduling for WJUX as necessary, arranging promotional and public service announcements on WJUX, supervising Montana, and participating in the development of public affairs programs (which are first broadcast on WVOX) and furnished to Jukebox Radio for later broadcast on WJUX. F&C at 47-48. Universal submits that Blabey's WJUX duties are, for the most part, not managerial in nature and are not performed on a full time basis for WJUX (his principal duties are as general manager of WVOX AM/FM); accordingly, MMBI does not meet the minimum requirements for main studio staffing. See Universal's F&C at 36.

3. MMBI cites KQQK, Inc., 10 FCC Rcd 132 (MMB 1995), for the proposition that the Commission staff has not ruled that full-time managerial presence must also be exclusive managerial presence. In KQQK, KGBC (AM), Galveston, Texas, rented main studio space in the KGBC main studio building to KQQK (FM), a competing Galveston radio station which was principally programmed and operated from an auxiliary studio in Houston. The KGBC general manager also served as the assistant general manager of KQQK at its main studio in Galveston; accordingly, the facts in KQQK are similar to the WJUX main studio staffing situation. In KQQK, the staff ruled that there was no basis to find that the KQQK assistant general manager was authorized to make typical managerial decisions pertaining to facilities, equipment, programming, sales or emergency

procedures but, rather, he was only available to answer questions relating to KQQK and had the ability to contact KQQK personnel at the auxiliary studio in Houston via a toll free number; as these duties were not deemed managerial in nature, the staff found that there was no significant management presence at the KQQK main studio.

4. While Universal submits that KQQK supports a finding that Blabey does not give MMBI a meaningful managerial presence at the WJUX main studio, more significantly, the staff also stated at footnote 1 of the KQQK decision that “[w]ere we to accept Station KQQK’s assertion that Mr. Anderson [the KGBC general manager] held a managerial position at Station KQQK, we would be concerned with possible cross-interest implications because of Mr. Anderson’s connections with Station KGBC....However, since we find that no managerial presence existed at Station KQQK’s GPI [main] Studio, we need not address this issue.” Accordingly, Universal submits that MMBI is misguided in its reliance on KQQK for the proposition that the “FCC, having considered KQQK’s response, did not find as a matter of settled policy or rule that KQQK’s full-time managerial presence could not under any circumstances be provided by a person who simultaneously ran another radio station in the same building.” C&F at 50-51.

5. **Network Affiliation Agreement/Transfer of Control Issue.** MMBI asserts that the “network affiliation agreement” with Turro specifically binds the parties to comply with all FCC rules and regulations which, by inference, includes Section 73.3540 (a) which precludes a transfer of control without prior FCC consent; using tautological, circular reasoning, MMBI wishfully states that since it has neither sought nor obtained FCC consent to transfer control of WJUX, the “network affiliation agreement,” by its terms, requires that MMBI maintain ultimate control over WJUX and there is no evidence that MMBI has not done so. F&C at 56. As Universal observed in its summary statement, “the devil is in the details”; the “network affiliation agreement” does not change the fact that a) there is no meaningful managerial presence at the WJUX main studio, b) Turro provides all

the WJUX programming which is principally directed to Bergen County, New Jersey, and not Monticello, New York and surrounding areas of Sullivan County, and c) Turro indirectly has provided and continues to provide all capital and operating funds for WJUX and a profit to MMBI and, but for such funding (and Jukebox Radio's programming), MMBI would never have acquired WJUX.

6. MMBI maintains that the "network affiliation agreement" pursuant to which Turro brokers virtually all WJUX's programming and commercial content is the same as an LMA which is permitted by Commission rulings, such as Choctaw Broadcasting Corporation, 12 FCC Rcd 8534 (1997). This argument is deceptively appealing, but it is also wrong because it fails to take into consideration a substantive and distinguishing difference between a traditional radio LMA and the "network affiliation agreement" between Turro and MMBI.

7. As noted by the Commission in Choctaw, "our general concern with the pervasive influence which can be exercised by program suppliers is clearly evidenced by our decision to consider a 'brokered' radio station an attributable interest of the program supplier for purposes of the local radio ownership rules where the program supplier provides more than 15% of the brokered station's weekly programming and owns another radio station in the same market. See 47 C.F.R., §73.3555 (a) (2)." 12 FCC Rcd at 8452-53. In other words, an entity or individual cannot broker a radio station, i.e., provide more than 15% of the brokered station's weekly programming, if such radio station could not be owned by the broker consistent with the Commission's local market radio ownership restrictions.

8. While Turro owns translator stations and not radio broadcast stations subject to the local market radio ownership restrictions of Section 73.3555 (a) (2) of the Rules, nevertheless, Turro is subject to the translator/radio ownership restrictions of Section 74.1232 (d) of the Rules which provides, in pertinent part, as follows:

An authorization for an FM translator whose coverage contour extends beyond the protected contour of the commercial primary station will not be granted to the licensee or permittee of a commercial FM radio broadcast station. Similarly, such authorization will not be granted to any person or entity having any interest whatsoever, or any connection with a primary FM station. Interested and connected parties extend to...business associates.

Thus, as Turro's W276AQ and W232AL serve areas outside the WJUX 1.0 mV/m protected contour, Turro could neither own WJUX in combination with the translators nor could Turro have an ongoing business relationship with WJUX such as through a "network affiliation agreement"; in other words, since Turro cannot own WJUX or even have a business relationship with WJUX, he clearly cannot evade those ownership restrictions by brokering 100% of the WJUX programming. Thus, it is misleading for MMBI to argue that its "network affiliation agreement" with Turro was nothing more than a traditional LMA which is sanctioned under the Commission's Rules and case precedents; the Turro/MMBI "network affiliation agreement" is not sanctioned, but, rather, is specifically proscribed by the Commission's Rules.

9. The Turro/MMBI "network affiliation agreement" was per se illegal under Section 74.1232 (d) of the Rules and that clear illegality was not in any way altered by the Commission's 1991 declaratory ruling. Indeed, the very fact that MMBI and Turro entered into a "network affiliation agreement" permitting Turro to program WJUX is, arguably, the single most damning piece of evidence that Turro and MMBI engaged in a calculated and deliberate conspiracy to effect a de facto transfer of control of WJUX from MMBI to Turro; this illegal arrangement was not something which was stumbled into, it controlled Weis' decision to have MMBI purchase WJUX and it controlled Turro's decision to pay any amount of money Weis demanded so long as it made business sense to Jukebox Radio. Turro and Weis are not innocents abroad playing basketball in a minefield of Commission regulations; they tried to deceive the Commission and beat the system, and that fatal mistake makes both Turro and MMBI/Weis unfit to be Commission licensees.

Turro

10. **WMG-499 Microwave Link.** Turro devotes an extensive portion of his proposed findings and conclusions to establish that W276AQ could and did receive the WJUX signal off air and attack the probity of any evidence to the contrary; Universal submits, however, that record evidence of this nature is inconclusive and not dispositive because it does not disprove that Turro illegally used WMG-499 to transmit programming directly to W276AQ for broadcast. Universal continues to believe that the most objective and probative evidence as to whether Turro improperly used WMG-499 to transmit programming to W276AQ is Loginow's surprise May 15, 1995, inspection and what transpired after Loginow jammed reception of the WMG-499 signal at W276AQ.

11. Turro's testimony on the jamming incident, however, simply does not comport with what happened and supports the conclusion that Turro has engaged in misrepresentation and perjury before the Commission. Turro contends that "in the event that the Fort Lee translator lost the entire signal of WMG-499 [i.e., both the audio and data channels], then it [W276AQ] was programmed to home onto the signal of either the Pomona translator or the Monticello station and immediately retransmit the signal of one of those stations." F&C at 60. Loginow did not just jam the data channel of WMG-499, he jammed the frequency in its entirety, knocking the entire circuit off the air. Since W276AQ was not receiving WMG-499 at all during Loginow's jamming, W276AQ should have continued to transmit W233AL as Turro alleges it was doing at the time of the jamming incident. But when the jamming stopped and the WMG-499 signal was again received at W276AQ, it was the signal of WMG-499 which W276AQ broadcast and not that of W232AL. See Universal's F&C at 8-10, 30. It is ironic, but eminently fitting, that the extensive record testimony of expert

engineering witnesses in this proceeding should be of little or no decisional significance and that Turro, who concocted this engineering marvel, is hoist with his own petard.

12. **De Facto Transfer of Control Issue.** Turro asserts that he never exercised operational or financial control over WJUX and points to the fact that while “Jukebox Radio made programming available to the Monticello station continuously, or nearly so, under the Network Affiliation Agreement [sic], the record shows that MMBI had the right to reject programming and that it retained all of its duties and obligations as an FCC licensee....Therefore, the record is clear that Mr. Turro did not take control of the Monticello station.” F&C at 116. While MMBI may have retained its right pursuant to the amended “network affiliation agreement” to preempt Jukebox Radio programming, MMBI, in fact, never preempted any of Jukebox Radio’s programming in over three years since Turro began brokering WJUX. While the failure to preempt Jukebox Radio programming may not be unusual, Universal submits that it is significant that MMBI did not reserve or hold back any time whatsoever so that MMBI could address community issues, but, rather, brokered 100% of WJUX’s broadcast time to Turro’s Jukebox Radio.

13. **Turro’s Credibility.** Turro states that his “history of communications with the Commission ...demonstrate candor. His January 1991 request for a declaratory ruling was forthright and there was no evidence that he made any attempt to deceive the Commission....Seeking guidance in writing from the Commission demonstrates candor in and of itself.” F&C at 117. For a different viewpoint on Turro’s candor, or lack thereof, see Universal’s F&C at 27-28, 43. In 1991, Turro told the Commission only that which suited his interest; he did not tell the Commission that he would be providing 100% of the primary station’s programming or that he would indirectly pay for all the primary station’s purchase cost and its capital and operating costs. While seeking guidance from the Commission may demonstrate candor, that was not the case here; indeed, it is Turro’s very lack of

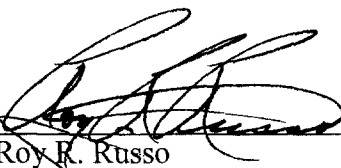
candor with the Commission, coupled with MMBI/Weis' complicity in Turro's scheme, that is responsible for the present circumstances in which he and MMBI/Weis now find themselves.

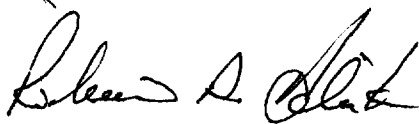
Conclusion

14. For those reasons set forth in Universal's proposed findings of fact and conclusions of law and its instant reply, Turro's licenses for W276AQ and W232AL and MMBI's permit for WJUX must be revoked as both Turro and MMBI/Weis have engaged in a) an unauthorized de facto transfer of control of WJUX, b) other numerous and flagrant violations of the Commission's Rules and c) misrepresentation and lack of candor before the Commission. Simply stated, Turro and MMBI/Weis are unfit to be Commission licensees.

Respectfully submitted

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By 
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April 3, 1998

CERTIFICATE OF SERVICE

I, M. Linda Stewart, a secretary in the law firm of Cohn and Marks, hereby certify that I have, this day, 3rd, April 1998, by hand delivery, as indicated, the foregoing to the following:

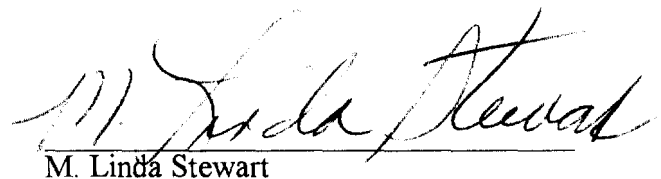
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